

1 KAREN A. OVERSTREET
Bankruptcy Judge
2 United States Courthouse
700 Stewart Street, Rm. 6301
3 Seattle, WA 98101-1271
(206) 370-5330
4

5 UNITED STATES BANKRUPTCY COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 In re

8 Charlie J. Berlin
9

Chapter 13

Bankruptcy No. 09-20305

ORDER DENYING MOTION
FOR RECONSIDERATION

11
12 This matter came before the court on Debtor's "Motion for
13 Reconsideration on Debtor's [Motion to] Modify Chapter 13 Plan After
14 Confirmation to Pay Off the Confirmed Chapter 13 Plan and Receive an
15 Early Discharge". Debtor asks this court to reconsider its Order
16 Denying Debtor's Motion to Modify entered on May 3, 2010. Debtor
17 contends that the court erred in its application of the Ninth
18 Circuit Bankruptcy Appellate Panel's decision in *In re Sunahara*, 326
19 BR 768 (B.A.P. 9th Cir. 2005), to the facts of this case.
20 Specifically, debtor argues that the Bankruptcy Code imposes no
21 mandatory commitment period for a below median income debtor, thus a
22 debtor may "pay off" his plan at whatever time he can feasibly do
23 so. Further, debtor argues that this district's form Chapter 13
24 plan (LBR Form 13-3, amended to LBR Form 13-4 on December 1, 2009)
25 abridges debtor's substantive rights under the Bankruptcy Code.
26 Finally, debtor argues that debtor's proposed Plan modification
27 meets *Sunahara's* good faith requirement. Debtor contends that
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1 proper application of the BAP's ruling in *Sunahara* to the facts of
2 this case requires granting debtor's Motion to Modify Chapter 13
3 Plan After Confirmation to Pay Off the Confirmed Chapter 13 Plan and
4 Receive an Early Discharge ("Motion to Modify").

5 STANDARDS FOR RECONSIDERATION

6 Motions for reconsideration are disfavored in this district.
7 The local federal district court rules direct that a court should:
8 ordinarily deny such motions in the absence of a
9 showing of manifest error in the prior ruling or a
10 showing of new facts or legal authority which could
not have been brought to its attention earlier with
reasonable diligence.

11 Civil Rule 7(h)(1), Local Rules W.D. Wash. The bankruptcy court
12 does not have an inherent ability to reconsider or reform its prior
13 orders. *In re Mulvania*, 214 B.R. 1 (B.A.P. 9th Cir. 1997).

14 Plaintiff brings this motion under Federal Rule of Civil
15 Procedure 59(e). A motion under Rule 59(e)

16 should not be granted absent highly unusual
17 circumstances, unless the district court is
18 presented with newly discovered evidence,
committed clear error, or if there is an
intervening change in the controlling law .

19 *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001)(citing *McDowell*
20 *v. Calderon*, 197 F.2d 1253, 1255 (9th Cir. 1999)(*en banc*)(quoting
21 *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir.
22 1999)); see also Fed. R. Civ. P. 60(b).

23 FACTS

24 Debtor filed this case and his original Chapter 13 Plan on
25 October 2, 2009. On December 2, 2009, debtor filed his Amended
26 Chapter 13 Plan dated November 19, 2009 ("the Plan"). The Plan
27 calls for periodic payments of \$82 per month. In addition,
28 Paragraph 1(B) of the Plan states:

1 Debtor(s) X COMMITS; DOES NOT COMMIT; all
2 tax refunds to funding the Plan. Committed refunds
3 shall be paid in addition to the plan payment stated
above. If no selection is made, tax refunds are
committed.

4 Debtor marked an "X" on the line prior to "COMMITTS", thereby
5 indicating that he proposed to commit future tax refunds to the
6 Plan.

7 The Plan specifies that it will run for a period of 36 months.
8 Debtor's Plan was confirmed January 22, 2010. Debtor's Motion to
9 Modify was filed March 30, 2010.

10 STANDARDS FOR MODIFICATION

11 The BAP's decision in *Sunahara* states that the minimum payment
12 provisions of 11 U.S.C. § 1325(b) do not apply when considering plan
13 modification under 11 U.S.C. § 1329. *In re Sunahara, supra*, at 781.
14 Debtor argues that *Sunahara* stands for the proposition that when a
15 debtor has no projected disposable income, a debtor who requests
16 modification cannot be required to "stay in" a plan for the 36 month
17 commitment period. The *Sunahara* decision is not that broad.
18 Although a large portion of the BAP's decision analyzes applicable
19 commitment period under Section 1325(b), the *Sunahara* court
20 specifically recognized that plan modification under Section 1329
21 requires examination of the proposed modification under sections
22 1322(a), 1322(b) and 1323(c) and 1325(a). *Id.* at 782. Analyzing a
23 proposed modification requires consideration of the debtor's
24 overall financial condition, including the following non-exclusive
25 factors:

- 26 1. Debtor's current disposable income;
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1 2. The likelihood that debtor's disposable income will
2 significantly increase due to increased income or
3 decreased expenses over the remaining term of the
4 original plan;

5 3. The proximity of time between confirmation of the
6 original plan and the filing of the modification
7 motion; and

8 4. The risk of default over the remaining plan term
9 versus the certainty of immediate payment to
10 creditors.

11 *Id.* at 781-82.

12 The factors present in this case suggest that the Debtor's
13 Motion to Modify was properly denied. Debtor's Motion to Modify was
14 filed only 67 days after confirmation of the Plan. In support of
15 his Motion to Modify, debtor said was in trade school and was
16 therefore unable to work. However, according to the schedules,
17 debtor was unemployed and in school at the time the case was filed,
18 so unemployment was not a change in circumstances. Debtor's
19 declaration in support of the Motion to Modify did not say how long
20 debtor was going to be in school nor did it discuss what debtor's
21 prospects for employment might be when he completed his schooling.
22 At the hearing on the Motion to Modify counsel indicated that debtor
23 had in fact completed trade school. There is no evidence of a
24 change in financial circumstances or a change in disposable income
25 between the date the Plan was confirmed and the date the Motion to
26 Modify was filed. Nothing in the record indicates that debtor's
27 overall financial situation deteriorated after the Plan was
28

1 confirmed. In fact, it appears that debtor's overall financial
2 condition may be improving.

3 The confirmed Plan calls for payments of \$82 per month, and
4 specifically commits payment of debtor's future tax refunds into the
5 Plan for the plan term. In the Motion to Modify, debtor suggests
6 using his 2009 tax refund to "pay off" the Plan. Since the debtor
7 *already committed* future tax refunds to the Plan, using a tax refund
8 to make a lump sum payment will not "pay off" the Plan. Upon
9 completion of the confirmed Plan, debtor will receive a discharge of
10 over \$75,000 in general unsecured debt. Debtor has not demonstrated
11 any significant change in financial circumstances since the date his
12 Plan was confirmed which would warrant modification pursuant to 11
13 U.S.C. § 1329.

14 FORM PLAN PROVISION'S IMPACT ON SUBSTANTIVE RIGHTS

15 Debtor argues that this district's form Chapter 13 plan (LBR
16 Form 13-3, amended to LBR Form 13-4 on December 1, 2009) abridges
17 debtor's substantive rights under the Bankruptcy Code. Debtor
18 argues that Paragraph 1(B) of the form Chapter 13 plan, which
19 includes the language "[i]f no selection is made, tax refunds are
20 committed" imposes a requirement to pay funds into the plan which is
21 not found in the Code. Debtor contends that requiring all debtors
22 to pay future tax refunds into a plan has the effect of preventing a
23 debtor from paying off his plan early. Debtor contends that this
24 result is contrary to the Bankruptcy Code and the BAP's ruling in
25 *Sunahara*, and therefore that the form Chapter 13 plan used in this
26 district is invalid under Federal Rule of Bankruptcy Procedure
27 9029(a).

28

1 Debtor's arguments are without merit. In this case, debtor
2 specifically marked "COMMITTS" on his plan form, indicating his
3 election to commit future tax refunds to the payment of creditors
4 under the terms of his Plan. Therefore, in this case the default
5 provisions of the district's form plan were not operative. Debtor
6 chose to pay his future tax refunds to creditors when he sought
7 confirmation of the Plan.

8 However, even if debtor had not checked the box specifically
9 committing his future tax refunds to the Plan, this district's form
10 Chapter 13 plan does not impose any obligation contrary to the
11 Bankruptcy Code. In proposing Chapter 13 plans, debtors in this
12 district are free to decide whether or not to commit their future
13 tax refunds to the plan. The district's form plan does not *require*
14 that refunds are committed to a plan; it simply clarifies that by
15 failing to make an affirmative selection of either "commits" or
16 "does not commit" on the form plan, debtors are opting by default to
17 commit their future tax refunds to their plan. Contrary to debtor's
18 assertion, Paragraph 1(B) of the form Chapter 13 plan does not
19 require payment of tax refunds into the plan, so it does not abridge
20 any substantive rights granted by the Bankruptcy Code.

21 CONCLUSION

22 Charles Berlin filed his petition for relief under Chapter 13
23 October 2, 2009. He proposed a Plan calling for payments of \$82.00
24 per month, and specifically chose to commit his future tax refunds
25 to the Plan. That Plan was confirmed January 22, 2010. Only 67
26 days after the Plan was confirmed, debtor filed his Motion to
27 Modify. Debtor proposed to use one of his tax refunds - which was
28 already committed to creditors under the terms of his confirmed Plan

1 - to "pay off" the modified plan. Because debtor failed demonstrate
2 any significant change in financial circumstances after the date his
3 Plan was confirmed which would warrant modification pursuant to 11
4 U.S.C. § 1329, the court denied debtor's Motion to Modify. On
5 reconsideration, debtor has not demonstrated manifest error in the
6 court's prior ruling or made a showing of new facts or legal
7 authority which could not have been brought to the court's attention
8 earlier.

9 NOW, THEREFORE, for the foregoing reasons, the Debtor's
10 Motion for Reconsideration on Debtor's [Motion to] Modify Chapter 13
11 Plan After Confirmation to Pay Off the Confirmed Chapter 13 Plan and
12 Receive an Early Discharge is DENIED.

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14 ***** END OF ORDER *****

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17 United States Bankruptcy Judge
18 (Dated as of Entered on Docket date above)
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